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NO. 92-1487

In The
Supreme Court of the United States

October Term 1992

CLEO ALLEN BUTLER,
Individually and For and on Behalf of the Minor,
Michelle Butler, and ARLENE MAJOR,
As Custodian of the Minor, Michelle Butler,
Petitioners,

Versus

JEROME T. MEDLEY, M.D.,
WARREN P. MCKENNA, JR., M.D.,
and JOSEPH P. BRAUD, M.D.,
Respondents.

On Petition for
Writ of Certiorari to the
Supreme Court of Louisiana

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this case are:

(a) whether the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, requires medical malpractice plaintiffs to be considered a "suspect class" for purposes of Equal Protection analysis under the United States Constitution; and

(b) whether a Louisiana statute which limits the recovery of plaintiffs in medical malpractice actions to $500,000, together with full recovery of medical expenses, La. Rev. Stat. § 40:1299.42(B), is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

1. *Petitioner.* The sole party plaintiff below, and thus the sole proper petitioner herein, is ARLENE MAJOR, in her capacity as tutrix of Michelle Butler. Although petitioner's counsel additionally lists Cleo Allen Butler and Michelle Butler as parties to this proceeding, Arlene Major was substituted for Cleo Allen Butler as sole plaintiff herein by pleadings filed in 1985 and Michelle Butler is not and has never been a party to this action in her own right.†

2. *Respondents.* Respondents herein are JEROME T. MEDLEY, M.D., WARREN P. MCKENNA, JR., M.D., and JOSEPH P. BRAUD, M.D. The LOUISIANA PATIENT'S COMPENSATION FUND, a statutory fund constituted under the Louisiana Malpractice Act* to provide compensation to malpractice plaintiffs beyond a health care provider's limits of liability, remains a party interested in this proceeding and appears herein as respondent, though final judgment was entered against it two years ago, pursuant to the Fund's confession of judgment, and that judgment has not been questioned by petitioner in the courts below.

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†Initially brought by Cleo Allen Butler as "duly authorized tutrix" and mother, and Arlene Major as "custodian" of the minor, Michelle Butler, Claim for Damages–Jury Trial Requested, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Dec. 7, 1981), through a succession of supplemental and amended pleadings, Arlene Major was first eliminated as plaintiff, First Supplemental and Amending Petition (filed June 16, 1982), and later substituted for Cleo Allen Butler as tutrix of Michelle Butler and sole plaintiff herein. Eighth Supplemental and Amending Petition (filed Jan. 15, 1985). Arlene Major was confirmed as tutrix for Michelle Butler, then a minor, on January 4, 1985. Letters of Tutorship, In Re: Michelle Butler, No. 85-00121 (Civ. D. Ct., Orleans Parish, La., Jan. 4, 1985). Arlene Major is the maternal grandmother of Michelle Butler. Though now an adult, Michelle Butler has never been added or substituted as a party plaintiff herein.

*LA. REV. STAT. ANN. §§ 40:1299.41–.48 (West 1992 & Supp. 1993).

3. *Other Parties Below*. Beyond the parties identified here as respondents, plaintiffs' original petition for damages named four additional defendants: Flint-Goodridge Hospital of Dillard University (Flint-Goodridge), Sandra Viglia, the Westbank Medical Center, Ltd. (WMC), and Sherman Bernard, Commissioner of Insurance, State of Louisiana. Plaintiffs' claims against Flint-Goodridge, Sandra Viglia and WMC were settled in 1985 and judgment was entered dismissing those defendants. The Commissioner of Insurance was named solely in his capacity as statutory administrator of the Patient's Compensation Fund. By subsequent legislative act, that responsibility has now been transferred to a Patient's Compensation Fund Oversight Board.

4. *Recital Required by Rule 29(c)*. As required by Sup. C. R. 29(c), it is noted that by the instant petition for certiorari, as she had below, petitioner questions the constitutionality of a Louisiana statute, La. Rev. Stat. § 40:1299.42, and neither the State of Louisiana nor any agency, officer, or employee thereof is a party to this proceeding;†† 28 U.S.C. § 2403(b) may be applicable. It is unknown whether petitioner has served her petition for certiorari on the Attorney General of the State of Louisiana.

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††The Patient's Compensation Fund is not itself an agency of the State of Louisiana.

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In The
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CLEO ALLEN BUTLER,
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By the petition for writ of certiorari herein, the Court is pressed to review an opinion of the Supreme Court of Louisiana confirming the constitutionality of a facet of the Louisiana Medical Malpractice Act which, without affecting recovery of all medical expenses, limits recovery of general damages in a malpractice action to $500,000. Having previously grounded her desultory challenges to the statute almost exclusively in various Louisiana Constitutional provisions, petitioner is necessarily relegated here to the single contention that the statute "violates the equal protection clause of the Fourteenth Amendment of the United States Constitution."[1]

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[1] Petition for Writ of Certiorari 17.

But, conceding implicitly here as she had explicitly below that the statute would certainly survive scrutiny under the well-established principles of Equal Protection analysis, petitioner now advances a novel and truly extraordinary two-part theory: that the Americans with Disabilities Act of 1990 (ADA) compels the Court to treat disabled persons ("individuals with disabilities") as a "suspect class" for purposes of Equal Protection analysis;[2] and that a law limiting the damages recoverable by a medical malpractice plaintiff discriminates against disabled persons.

The theory is extraordinary for its underlying premises that the Congress may broaden the reach of constitutional protections by simple statutory fiat and that limitations on damages discriminate against malpractice plaintiffs "because of" their physical disability. It is doubly novel in that such a proposition has never been accepted by any court and, more significantly, in that petitioner's contentions to this effect were articulated, for the first time, *after* the Louisiana Supreme Court had decided this case, in her petition for rehearing. That court, as a result, had no occasion to reach or decide the issue which petitioner now urges on the Court.

The subject petition is, thus, jurisdictionally defective, for the federal questions which it seeks to present are raised here in the first instance and were neither decided by nor timely presented to the state court whose opinion is challenged. *Webb* v. *Webb*, 451 U.S. 493 (1981); *Hanson* v. *Denckla*, 357 U.S. 235 (1958). Even were this case reviewable on certiorari, moreover, it does not present a federal question which is substantial in any sense, nor does it evince any significant reason to command the Court's attention. Because there is none, petitioner identifies no conflict among the Federal appellate courts, among state courts of last resort, or between a state supreme court and a Federal court of appeals. And because the Louisiana Supreme Court had no occasion to consider petitioner's constitutional claim *du jour*, it clearly cannot be said that that court "has decided a federal question in a way that conflicts with applicable decisions of this Court. Sup. C. R. 10.1.

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[2] *Id.* 10.

This brief, accordingly, is submitted jointly on behalf of the respondents Jerome T. Medley, M.D., Warren P. McKenna, Jr., M.D., and Joseph P. Braud, M.D.,[3] in opposition to the petition for writ of certiorari filed herein. Whether for lack of jurisdictional bases, for want of a "special and important" reason under Rule 10, or otherwise, this case simply does not warrant review by the Court.

THE STATUTE AT ISSUE

The statute at issue in this case, limiting a plaintiff's recovery in a malpractice action against health care providers enrolled with a state-administered patient's compensation fund, is but one of a fascicle of measures enacted by the Louisiana Legislature during 1975 and 1976 as remedial responses to a medical malpractice crisis,[4] a crisis of nationwide breadth and concern,[5] engendering a variety of state legislative responses focused principally at "guaranteeing the availability of malpractice insurance, modifying tort doc-

[3]Drs. Medley and McKenna are and have been represented in this litigation by Adams and Reese, New Orleans, Louisiana. Dr. Braud is represented by Thomas, Hayes and Beahm, New Orleans, Louisiana.

[4]*See, e.g.*, Acts 1975, No. 477, *as amended*, LA. REV. STAT. ANN. § 40:1299.37 (West 1992 & Supp. 1993) (malpractice coverage for state hospitals); No. 674, *as amended*, LA. REV. STAT. ANN. § 40:1299.38 (malpractice coverage for state employees); No. 529, *as amended*, LA. REV. STAT. ANN. § 40:1299.40 (uniform consent law); No. 798, *as amended*, LA. REV. STAT. ANN. §§ 40:1299.51-.56 (medical consent law); No. 817, *as amended*, LA. REV. STAT. ANN. §§ 40:1299.41-.48 (medical malpractice law); Acts 1976, No. 66, *as amended*, LA. REV. STAT. ANN. § 40:1299.39 (medical malpractice law for state institutions and employees).

[5]Perhaps the most comprehensive treatment of the medical malpractice crisis at the time was given in U.S. Dept. of Health, Ed. & Wel., Pub. No. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973).

trines in malpractice claims, or reducing the occurrence of malpractice."[6] The problem was said to reflect an "intricate network of interrelated causes and effects,"[7] though the immediate cause for remedial legislation in Louisiana was the deteriorating condition of the health care liability insurance market, confronting professional and institutional providers with rapidly escalating, and in some instances prohibitive, costs, and prompting many insurers to withdraw from the market altogether. See *Everett* v. *Goldman*, 359 So.2d 1256, 1261 (La. 1978).

Among the measures adopted by the Louisiana Legislature were a series of statutes now commonly referred to as the Medical Malpractice Act (the Act),[8] providing for pre-suit submission of malpractice claims for screening by a "medical review panel;"[9] establishing a Patient's Compensation Fund (the Fund), funded by premium-like surcharges paid by enrolled health care providers, as a fund for payment of catastrophic damages;[10] requiring health care providers, as a condition of enrollment with the fund, to demonstrate financial responsibility by evidencing insurance or self-insurance sufficient to pay claims up to $100,000;[11] and limiting the recovery of damages in any case to $100,000 from a qualified health care provider and an additional $400,000 from the Fund.[12] The recovery limitation fixed by La. Rev. Stat. § 40:1299.42(B), thus, was but part of numerous integrated measures "passed in response to sharp increases in medical malpractice insurance rates and the resulting threat of reduced health care to the patient and of greatly increased medical costs to the public." *Valentine* v.

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[6]Note, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

[7]*Id.*

[8]LA. REV. STAT. ANN. §§ 40:1299.41–.48 (West 1991 & Supp. 1993).

[9]La. Rev. Stat. § 40:1299.47.

[10]La. Rev. Stat. § 40:1299.44.

[11]La. Rev. Stat. § 40:1299.42(A).

[12]La. Rev. Stat. § 40:1299.42(B).

Thomas, 433 So.2d 289, 292 (La. App. 1st Cir.), *writ denied*, 440 So.2d 728 (La. 1983).

As respects malpractice actions against health care providers qualified and enrolled with the Fund under the Act, La. Rev. Stat. § 40:1299.42(B) provides that:

> (1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and costs.
>
> (2) A health care provider qualified under this Part is not liable for an amount in excess of one hundred thousand dollars for all malpractice claims because of injuries to or death of any one patient.
>
> (3)(a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40: 1299.44(C).
>
> (b) The total amounts paid in accordance with Paragraphs (2) and (3) of this Subsection shall not exceed the limitation as provided in Paragraph (1) of this Subsection.[13]

The reference to La. Rev. Stat. § 40:1299.43, it should be noted, reflects a 1984 amendment of the Act to provide for the Fund's payment of all future medical care and related expenses incurred by a plaintiff as a consequence of the malpractice incident complained of, recognizing such provision as an exception to the limitation imposed by § 1299.42(B).[14]

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[13]Acts 1975, No. 817, *as amended by* Acts 1984, No. 435.

[14]By the terms of the 1984 act, the exception was made applicable only to claims filed on or after September 1, 1984, as a result of which the present case would be controlled by the pre-amended version of § 1299.42(B). But in *Williams* v. *Kushner*, 549 So.2d 294 (La. 1989), the Supreme Court "reformed" the Act to

STATEMENT OF THE CASE

This is a medical malpractice action for damages said to have been suffered by Michelle Butler, then a minor, as the result of a surgical procedure performed in May 1976 at Flint-Goodridge Hospital of Dillard University (Flint-Goodridge). Alleging negligence in the administration of anesthesia and in the conduct of the surgery, the original petition joined as defendants Flint-Goodridge; Sandra Viglia, a hospital-employed nurse-anesthetist who attended the procedure; Joseph P. Braud, M.D., as the "staff anesthesiologist" for the hospital; and Jerome T. Medley, M.D., and Warren P. McKenna, Jr., M.D., as the surgeons who performed the procedure.[15] Recognizing that all defendants were qualified and enrolled with the Patient's Compensation Fund under the Louisiana Medical Malpractice Act,[16] and seeking recovery of compensation from the Fund beyond that sought from the individual defendants and, indeed, beyond the maximum permissible recovery under the Act, the original petition also named defendant the then Commissioner

(footnote cont'd)

make the future medicals provision applicable to claims, such as the instant action, still pending when the subject amendment was adopted.

[15]Claim for Damages—Jury Trial Requested, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Dec. 7, 1981) [hereinafter referenced as Original Petition]. This action actually had its genesis some five years earlier, when the action was sought to be filed against Flint-Goodridge and Drs. Medley and McKenna prior to the submission of the claim to a medical review panel as required by the Medical Malpractice Act. Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 76-13030 (Civ. D. Ct., Orleans Parish, La.). Rejecting plaintiff's challenge to the constitutionality of the Act in that respect, the trial court sustained exceptions of prematurity interposed by the defendants and dismissed the action as against all defendants. The judgment was affirmed by a state appellate court and writs were denied by the Louisiana Supreme Court. Butler v. Flint-Goodridge Hospital, 354 So.2d 1070 (La. App. 4th Cir.), *writ denied*, 362 So.2d 574 (La. 1978).

[16]Acts 1975, No. 817, *as amended*, LA. REV. STAT. ANN. §§ 40:1299.41-1299.48 (West 1992 & Supp. 1993).

of Insurance in his capacity as administrator of the Fund, and prayed that "LRS 40:1299 *et seq.*, be declared unconstitutional...."

Plaintiff effected a settlement of her claims against Flint-Goodridge and the defendant CRNA in 1985, receiving payment of $100,000, while reserving her rights against the remaining defendants (*i.e.*, Drs. Braud, Medley and McKenna and the Fund).[17] Because the settlement constituted an admission of the liability of Flint-Goodridge and its nurse-anesthetist for purposes of seeking additional compensation from the Fund,[18] the Fund stipulated to its liability and confessed judgment for the maximum amount of recovery permissible against it under La. Rev. Stat. § 40:1299.42—*i.e.*, an "additional $400,000 together with legal interest from the date on which the claim was initiated with the Commissioner...and for court costs."[19] The district court subsequently entered judgment against the Fund for $400,000, interest from the date of the claim, and for "medical care and related expenses" pursuant to La. Rev. Stat. § 40:1299.43.[20] Because plaintiff refused to accept payment of the judgment, in early 1991 the Fund deposited the amount represented by the judgment in the registry of the court. Inexplicably, to this date petitioner has not withdrawn such payment (and accumulated interest), though she has accepted periodic payments totalling over $70,000 for medical and custodial care over and above the amount deposited by the Fund into the district court registry.[21]

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[17]Motion to Dismiss with Prejudice, Cleo Allen Butler, *Et Al.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 76-13030 (Civ. D. Ct., Orleans Parish, La., Jan. 14, 1985).

[18]La. Rev. Stat. § 40:1299.44(C)(5); *see* Stuka v. Fleming, 561 So.2d 1371 (La. 1990).

[19]Answer of Sherman A. Bernard, Commissioner of Insurance, State of Louisiana, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Jan. 30, 1985).

[20] Judgment, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., Jan. 28, 1991).

[21]In this Court as below, petitioner's counsel offers that the Fund's payment was and continues to be refused because she "did not wish to jeopardize recovery against the...Fund for independent acts of malpractice by Drs. McKenna, Medley

Drs. Medley, McKenna and Braud then moved the court for summary judgment, observing that by virtue of the $100,000 settlement and the judgment against the Fund for $400,000 (plus interest and costs) and future medical expenses, the plaintiff had been accorded recovery to the full extent permitted by La. Rev. Stat. § 40:1299.42(B)(1) for "any injury to...a patient."[22] Hearing on the defendants' motions was successively deferred by the court pending the Louisiana Supreme Court's rulings in two cases which were expected to address, directly or indirectly, the constitutionality of La. Rev. Stat. § 40:1299.42(B).[23] When neither case ruled specifically ruled on the constitutional validity of the statute, and after the case had been assigned to a judge *ad hoc*, the motions for summary judgment were finally heard in November 1991.

In urging their motions, the defendants observed that the motions turned not on any issue of fact but solely on an issue of law—whether the applicable statutory limitation on recovery of damages was constitutional, a question which had already been answered as against each of the constitutional theories which plaintiffs then advanced. See *Sibley* v. *Board of Supervisors of La. State U.*, 462 So.2d 149 (La. 1985); *Williams* v. *Kushner*, 524 So.2d 191 (La. App. 4th Cir. 1988). Notwithstanding such controlling precedent, in further support of their motions for summary judgment, Drs. Medley, McKenna and Braud sought to independently meet the evidentiary burden posited by *Sibley* v. *Board of Supervisors of La.*

(footnote cont'd)

and Braud." Petition for Writ of Certiorari, at 6. Whatever that may mean, it is clearly settled, as petitioner has elsewhere acknowledged, that petitioner can as a matter of law obtain no additional recovery from the Fund, Williams v. Kushner, 549 So.2d 294 (La. 1989), and petitioner has not on appeal claimed entitlement on any grounds to any further recovery from the Fund.

[22]Motion for Summary Judgment [Drs. Medley and McKenna], Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed Feb. 1, 1985); Motion for Summary Judgment [Dr. Braud] (filed Feb. 8, 1985).

[23]*I.e.*, Sibley v. Board of Supervisors of La. State U., 462 So.2d 149, *modified on rehearing*, 477 So.2d 1094 (La. 1985); Williams v. Kushner, 549 So.2d 294 (La. 1989).

State. U,[24] supporting their motion with the entire record of sworn testimony and exhibits admitted into evidence during a five-week evidentiary hearing on the constitutionality of La. Rev. Stat. § 40:1299.42(B)(2) in *Williams* v. *Kushner*.[25] Plaintiff offered no controverting evidence either by opposing affidavits, depositions, answers to interrogatories, admissions or otherwise.

Following argument, the trial court judge advised of his intention to deny the motions for summary judgment on the principal ground, as urged by the plaintiff, that adjudication of the constitutionality of La. Rev. Stat. § 40:1299.42(B) would not be properly presented for decision until trial on the merits had been had and a verdict in excess of the limitation rendered.[26] When judgment to that effect was entered,[27] Drs. Medley, McKenna and Braud applied to the state appellate courts for a remedial writ. Plaintiff's opposition to the application rested on reiteration of the ripeness contention advanced in the trial court and on the alternative argument that the statute was unconstitutional under a variety of theories.

Without commenting on it explicitly, the appellate court implicitly rejected the notion that it was premature for the district court to decide the constitutionality of the statutory limitation, noting that as the plaintiff had already recovered "the maximum amount per-

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[24]477 So.2d 1094 (La. 1985).

[25]Prince A. Williams, *Etc.* v. Jack Kushner, *Et Al.*, No. 83-1115 (Civ. D. Ct., Orleans Parish, La.,). Therein the same division of the same district court had held that such evidence convincingly established that the questioned statute reflected a legitimate governmental objective and that the classification drawn by the statute was substantially related to the State's objective. It therefore entered judgment declaring that "La. Rev. Stat. 40:1299.42B is constitutional...." Judgment, Prince A. Williams, *Etc.* v. Jack Kushner, *Et Al.*, No. 83-1115 (Civ. D. Ct., Orleans Parish, La., Mar. 30, 1987). On appeal, relying on the same record, as a Federal appeals court later noted, "the Fourth Circuit closely followed *Sibley* in concluding that the cap is valid under the state's equal protection clause." Owens v. United States, 935 F.2d 734, 739 (5th Cir. 1991).

[26]Transcript of Reasons for Judgment, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., Nov. 15, 1991).

[27]Judgment, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., Dec. 13, 1991).

missible under the...Act," as a matter of law no further recovery was allowed under the statute, and plaintiff might defeat judgment "solely on the assertion that the statutory limit...is unconstitutional."[28] Having reference to it's prior decision in *Williams* v. *Kushner*, 524 So.2d 191 (La. App. 4th Cir. 1988), upholding the statute as constitutional, the appellate court summarily reversed the decision of the trial court and ordered that the defendants' motions for summary judgment be granted.[29]

In applying to the Louisiana Supreme Court for writ of review, with barely a passing nod to the prematurity contention she had maintained through the lower courts, plaintiff argued that the appellate court had erred in failing to hold the statutory limitation unconstitutional, advancing a variety of constitutional claims, abandoning some theories earlier pleaded or briefed and adding certain new constitutional theories. And yet another mix of constitutional contentions appeared in the brief on the merits which plaintiff submitted to the state Supreme Court. Respondents did not oppose that court's review of the case.

In an opinion rendered on October 19, 1992, the Supreme Court of Louisiana upheld the constitutionality of La. Rev. Stat. § 401299.42(B), affirming the court of appeal's judgment by holding generally that the statute "does not violate the state or federal constitutions." *Butler* v. *Flint Goodrich Hosp.*, 607 So.2d 517, 521 (La. 1992). Petitioner's subsequent petition for rehearing was denied by that court on November 25, 1992. It is that opinion which Arlene Major, as petitioner herein, now asks the Court to review on certiorari.[30]

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[28]Slip Op. at 1, Cleo Allen Butler, *Etc.* v. Flint Goodridge Hospital of Dillard University, *Et Al.*, Nos. 92-C-0062 & 92-C-1032 (La. App. 4th Cir., Feb. 3, 1992).

[29]*Id.* 2.

[30]Respondents' restatement of the case is regrettably compelled by the failure of petitioner's counsel to provide the court with an objective and accurate statement of the case. *See* Petition for Writ of Certiorari 5-9. Petitioner's account of the surgical procedure performed by the respondent physicians and nature and cause of Michelle Butler's condition, *id.* 5, thus, should be understood not as established fact but mere assertions which have no basis in the record below beyond the allegations of plaintiff's pleadings. And as noted more fully in our discussion

ARGUMENT

I. The Issue on Which Petitioner Seeks Review by the Court was not Timely Presented to or Decided by the Supreme Court of Louisiana.

While petitioner suggests that the issue now presented for review is, broadly, whether a limitation on recovery of damages in medical malpractice actions is consistent with the Equal Protection Clause of the 14th Amendment,[31] her petition for review in fact rests on a much more specific argument: that the Americans with Disabilities Act (the ADA) of 1990[32] constitutes "individuals with disabilities" as a "'suspect class' for purposes of equal protection analysis," and the Louisiana statute at issue should thus be subject to "strict scrutiny" because it discriminates against disabled persons. [33] That both branches of this claim are unfounded in law or in logic should be self-evident. What petitioner glosses over, however, is that this claim was articulated for the very first time in her petition for rehearing of the Louisiana Supreme Court's decision . That court, thus, had no occasion to consider and did not decide, explicitly or implicitly, the specific issues which petitioner now urges the Court to decide in the first instance.

To recite, as petitioner does here in a passing effort at compliance with Rule 14(h), that she has asserted federal equal protection as a basis for constitutional challenge of the subject statute,[34] is

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(footnote cont'd)

of the issues raised by petitioner below, petitioner's counsel misrepresents the nature of the legal claims and theories which she presented to the lower courts. Her statement of the case is thus one employed for argument, not for exposition. As such, the Court should exercise caution before referring to or relying on that statement.

[31] Petition for Certiorari at i.

[32] Pub. L. 101-336, 104 Stat. 328, 42 U.S.C. §§ 12101-12213.

[33] Petition for Certiorari 10.

[34] *See id.* 6-9.

merely to state that through the tortuous course of this litigation she has assailed the statute as "unconstitutional" on virtually every conceivable (and some inconceivable) grounds, among which she has on occasion invoked, usually without differentiation or elucidation, the due process and equal protection clauses of the Federal Constitution.[35] Before all courts below, however, petitioner's attack on La. Rev. Stat. § 40:1299.42(B) has been rooted principally and virtually exclusively in various provisions of the Louisiana Constitution which the statute was said to infringe. The essence of petitioner's arguments to the Louisiana appellate and Supreme Court, thus, was that the statute should be held unconstitutional under the peculiar and unique mode of equal protection analysis which the Louisiana Supreme Court had held applicable to inquiry under the State Constitution's Individual Dignity section in *Sibley* v. *Board of Supervisors of La. State U.*, 477 So.2d 1094 (La. 1985) (on rehearing). In fact, that was the only claim presented by petitioner's counsel, or even discussed, at oral argument of this case before the Louisiana Supreme Court.

Amidst the fog of state constitutional and nonconstitutional claims dispersed by petitioner in an effort to avoid the effect of the statutory limitation on recovery, federal equal protection considerations were at best given short shrift and were never seriously urged. Her brief to the state supreme court, thus, though extending some 26 pages and incorporating at least five distinct theories and claims, federal equal protection appears as but a single-page afterthought.[36] And even then, the argument made was not only insubstantial but very different from that which petitioner seeks to bring before this Court.

Federal and state courts alike, including Louisiana's Supreme Court, have uniformly held that, as a matter of Equal Protection un-

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[35]*See, e.g.*, Second Supplemental and Amending Petition ¶ 1, at 1-2, Cleo Allen Butler, *Etc.* v. Flint-Goodridge Hospital of Dillard University, *Et Al.*, No. 81-19167 (Civ. D. Ct., Orleans Parish, La., filed June 17, 1982).

[36]Original Brief Submitted on Behalf of Plaintiffs-Relators Cleo Allen Butler, Michelle Butler and Arlene Major, at 20, No. 92-CC-0559 (La. Sup. Ct., filed May 20, 1992).

der the United States Constitution,[37] a statutory limitation on medical malpractice damages, involving neither a fundamental right nor a suspect classification, need only be subject to a rational basis analysis, under which various state medical malpractice tort reform measures, including Louisiana's limitation on recovery, have been upheld.[38] Owing no doubt to the consistency and clarity with which the courts have upheld such statutes under federal equal protection scrutiny, petitioner has never asserted that La. Rev. Stat. 40:1299.42(B) is invalid under a rational basis analysis and, in fact, has conceded that the statute would not and could not be successfully challenged under such analysis.

Instead, her sole federal equal protection claim before the Louisiana Supreme Court proposed application of what she characterized as a "'heightened scrutiny' rational basis test,"[39] relying on but a single federal trial court decision, *Coburn* v. *Augustin*, 627 F. Supp. 983 (D. Kan. 1985). What she then conveniently omitted to acknowledge was that the mode of equal protection analysis applied by the trial judge in the aberrant *Coburn* was squarely rejected the following year by the Chief Judge of the same Kansas district court considering challenges to the same provisions of that state's medical malpractice laws. *Ferguson* v. *Garmon*, 643 F. Supp. 335 (D. Kan. 1986) (per O'Connor, Chief Judge). In doing so, Chief Judge O'Connor emphasized that the courts of appeals, including the Circuit encompassing the Kansas district courts, had unanimously "refused to discuss, much less recognize, the height-

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[37]U.S. Const. amend. 14.

[38]*See, e.g.*, Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Gronne v. Abrams, 793 F.2d 74 (2d Cir. 1986); Montagino v. Canale, 792 F.2d 554 (5th Cir. 1986); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985); Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984); Fitz v. Dolyak, 712 F.2d 330 (8th Cir. 1983); Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982); DiAntonio v. Northampton-Accomack Memorial Hospital, 628 F.2d 287 (4th Cir. 1980); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979); Sibley v. Board of Supervisors of La. State U., 462 So.2d 149, 157, *modified on rehearing*, 477 So.2d 1094 (La. 1985); Bazley v. Tortorich, 397 So.2d 475, 483 (La. 1981).

[39]*See* Original Brief, note 37, *supra*, at 20.

ened form of rational basis test enunciated in *Coburn*." 643 F. Supp. at 240.[40]

As insubstantial as it was, the *Coburn* argument demarked the beginning, and the end, of the federal equal protection claim raised before the Louisiana Supreme Court before it rendered its opinion herein. It is no wonder that the state court did not consider the claim sufficiently serious to warrant discussion in its opinion. Yet, the Louisiana Supreme Court's failure to address that claim is not the basis of petitioner's current petition for reversal of that court's decision. Rather, as previously noted, the instant petition rests on an equal protection claim which made its first appearance in petitioner's application to the Louisiana Supreme Court for rehearing.[41]

As petitioner's equal protection claim was raised for the first time in her application for rehearing addressed to the Louisiana court, it clearly comes too late for this Court to take cognizance of the issue under 28 U.S.C. § 1257, *Hanson* v. *Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945), particularly as it is certain that the Supreme Court of Louisiana did not entertain, consider, address or decide the issue in its opinion or in denying rehearing, without comment. See Appendix to Petition for Certiorari A-43. It could not be more certain, then, that because of petitioner's failure to timely present the equal protection claim she pursues here, the Louisiana courts had no opportunity to construe La. Rev. Stat. § 40:1299.42(B) in light of such federal constitutional challenge and that there was no opportunity for the development of evidence or argument on such issue, leaving the record in this case not only inadequate but necessarily void as concerns petitioner's freshly-minted equal protection claim.

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[40]The *Ferguson* court also found significant this Court's summary dismissal of an appeal from the California Supreme Court's decision in Fein v. Permanente Medical Group, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985), in which the state supreme court had employed a rational basis analysis in upholding a state limitation on recovery of noneconomic damages in medical malpractice cases.

[41]Application for Rehearing Submitted on Behalf of Plaintiffs-Relators Cleo Allen Butler, Michelle Butler, and Arlene Major, No. 92-CC-0559 (La. Sup. Ct., filed Nov. 1, 1992).

Such circumstances clearly identify this case as one in which the issue now urged on the Court was not properly or adequately presented below. See *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). As the Court has emphasized,

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. *Webb*, 451 U.S. 493, 496-97 (1981); see also *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983); *Beck* v. *Washington*, 369 U.S. 541 (1961).

The instant petition, in sum, does not satisfy the jurisdictional requirements of 28 U.S.C. § 1257. The Court should, and must necessarily, decline its review.

II. Petitioner's Equal Protection Claim Does Not Present a Substantial Federal Question

Petitioner's ADA-based equal protection claim does not, in any event, raise a federal question which might be considered substantial in any sense. For it is based on twin fallacies—that the statutory limitation on recovery of damages challenged here discriminates against disabled persons, and that the Americans with Disabilities Act dictates treatment of disabled persons as a "suspect class" for purposes of federal equal protection analysis.

Since the Louisiana Supreme Court held, in *Sibley* v. *Board of Supervisors of La. State U.*,[42] that, for purposes of analysis under the Louisiana constitution, a statute delimiting the damages recoverable in a personal injury action classifies and disadvantages individuals on the basis of "physical condition,"[43] petitioner has taken

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[42] 462 So.2d 149, *modified on rehearing*, 477 So.2d 1094 (La. 1985).

[43] 477 So.2d at 1109. Unlike the federal Constitution, the Louisiana Constitution may be read to provide an explicit textual basis for an altered scrutiny of

it as an article of faith that La. Rev. Stat. § 40:1299.42(B) effects a discrimination among medical malpractice plaintiffs based on the degree of their physical disability, the notion being that such a limitation allows full recovery to the less seriously injured while denying full recovery to the catastrophically injured. But the proposition may, at best, be accurate only in a small subset of malpracice cases and would be generally true only if it could be said that tort damages correspond, in a relatively exacting way, to a plaintiff's physical condition or degree of disability. They, of course, do not.

For one thing, whether undertaken by judge or jury, attaching a monetary value to personal injury is a subjective enterprise. As a result of the discretion necessarily accorded the trier of fact, it is not only possible, but not uncommon, for plaintiffs identical in physical condition to receive widely disparate damage awards. Given hypothetically identical injuries, that is, one plaintiff may win a verdict in excess of $500,000 and the other a much lower award. It must also be recognized that there are multiple components of damages recoverable in tort which do not relate to "physical condition" or "disability" as such. In many cases, thus, the major element of compensation claimed and awarded are for non-physical injuries, emotional and mental, or, indeed, for past mental anguish, pain, and the like. A plaintiff with no physical disability whatsoever may nonetheless be entitled to damages for such non-physical, or past physical, losses. Similarly, the quantum of claims for economic losses (lost wages, diminished earning capacity) do relate directly not to physical, but to financial condition. And it should be noted, finally, that the class of plaintiffs who may recover in medical malpractice or other tort claims is not limited to indi-

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(footnote cont'd)

statutes classifying individuals on the basis of "physical disability," as that constitution provides that "[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, *physical condition*, or political ideas or affiliations." La. Const. 1974, Art. I, § 22 (emphasis supplied). That is not to say, however, that La. Rev. Stat. § 40:1299.42(B) constitutes such a classification. As noted in the text, the Louisiana Supreme Court's conclusion to that effect is analytically flawed. Respondents did not, however, believe it necessary to question *Sibley's* holding in that respect to prevail on the constitutionality of the statute.

viduals who have been the direct victims of professional torts. Spouses and other family members may assert claims for loss of consortium, or for wrongful death. In such instances, again, it certainly could not be said that the damages awarded correspond to the nature or degree of the injury, or the physical condition, of the victim of malpractice. Palpably, then, statutes restricting the maximum damages recoverable do not discriminate against individual "because of" their physical condition or based on the degree of their disability. The line drawn by such statutes—*i.e.*, the classification drawn—is a wholly economic one, distinguishing between claims only by virtue of the level of monetary damages claimed and otherwise recoverable. Only a purposefully myopic view could possibly construe such a statute as one which "discriminates" against disabled persons.

To this analytic fallacy, petitioner adds a legal one—the remarkable proposition that federal equal protection analysis has, in some undefined fashion, been remade by Congressional enactment of the Americans with Disabilities Act—an act which she sees as "a call for heightened scrutiny under the federal scheme of equal protection analysis." Petition for Certiorari 12. Even while conceding that this Court "has previously declined to rule that persons with disabilities display the characteristics of a suspect class," *id.* 11,[44] petitioner nonetheless asks the Court to invent a wholly new equal protection standard. Absolutely no authority for this proposition is cited.[45] And there can be none. For federal equal protection analysis is analysis of what the Equal Protection Clause of the

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[44]*Citing* City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 445-46 (1985).

[45]Petitioner cites Katzenbach v. Morgan, 384 U.S. 641 (1966) as support for the proposition that "Congress should be granted some leeway...when it expands the reach of the equal protection guarantee of the Fourteenth Amendment." Petitioner for Certiorari 12. But *Katzenbach* certainly did not hold that Congress has the authority to "expand the reach" of the Constitutional Equal Protection guarantee or to dictate to the Court what categories of persons must be considered "suspect" classes for purposes of analysis under that clause. *Katzenbach* held only that, in exercise of the authority granted it under § 5 of the Fourteenth Amendment, Congress is not confined to prohibiting by legislation that which is prohibited by the Fourteenth Amendment itself, as interpreted by the judiciary.

United States Constitution commands, according special protection only to suspect classes identified or fundamental rights "explicitly or implicitly guaranteed by the Constitution" itself. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33-34 (1972). The scope and meaning of that command can neither be added to, subtracted from nor otherwise varied by statute. Yet, to accept petitioner's argument is to accept its preposterous predicate: that the ADA represents a Congressional amendment of the Federal Constitution. To state the proposition is, of course, to demonstrate its inherent absurdity.

Petitioner offers absolutely no authority which even remotely intimates that measuring La. Rev. Stat. § 40:1299.42(B) against the federal equal protection guarantee implicates any test other than the well-established rational basis standard, a standard against which legislative tort reforms in the area of malpractice actions have been consistently upheld by state and federal courts. As a result, this Court itself has consistently refused review of decisions upholding the constitutionality of malpractice damage limitations in the face of equal protection challenges, once in a decision on the merits,[46] and most recently, in denying *certiorari* review of a Missouri Supreme Court decision upholding that state's statutory limitation on malpractice damages. *Adams* v. *Children's Mercy Hospital*, 832 S.W.2d 898 (Mo.) (*en banc*), *cert. denied*, 506 U.S. ___, 113 S.Ct. ___, 121 L.Ed.2d 446 (Nov. 16, 1992).[47] The Court should do the same here, for petitioner offers neither authority nor reason for examining whether the statute here at issue here satisfies federal equal protection guarantees. This case simply does not present a substantial federal question .

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[46]Fein v. Permanente, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985). The appeal in *Fein* v. *Permanente*, where the California Supreme Court had employed the rational basis test in upholding a limitation on recovery of noneconomic damages in medical malpractice cases, was dismissed by the Courtas one not raising a substantial federal question.

[47]*See also* Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

III. There is No Conflict Among the Courts on the Constitutionality of Limitations on Malpractice Recovery as a Matter of Federal Equal Protection

Louisiana is hardly alone in having enacted tort reform legislation affecting medical malpractice claims or in incorporating a limitation on recovery in such legislation. When the Louisiana Medical Malpractice Act was adopted in the mid-1970s virtually every state and jurisdiction in the nation concurrently enacted some form of remedial legislation. Both then and since then a substantial number of sates have also deemed recovery limitations a reasonable and proper means of ensuring the availability and affordability of health care for their citizens.[48]

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[48]*See, e.g.*, ALA. CODE §§ 6-5-544, 6-5-547 (Supp. 1991) ($400,000 limitation on noneconomic damages); ALASKA STAT. § 09.17.010 (Supp. 1991) ($500,000 limitation on noneconomic damages); CAL. CIV. CODE § 3333.2 (West Supp. 1992) ($250,000 limitation on noneconomic damages); COLO. REV. STAT. § 13-21-102.5, § 13-64-302 (Supp. 1991) ($1 million limitation on all damages, $250,000 limitation on noneconomic damages); FLA. STAT. ANN. §§ 766.207, .209 (West Supp. 1992) ($350,000 limitation on noneconomic damages); HAW. REV. STAT. § 663-8.7 (1988 & Supp. 1991) ($375,000 limitation on damages for pain and suffering); IDAHO CODE § 60-1603 (1990) ($400,000 limitation on noneconomic damages, annually adjusted); ILL. ANN. STAT. ch. 70 ¶ 101 (Smith-Hurd Supp. 1978) ($500,000 limitation on all damages); IND. CODE ANN. § 16-9.5-2-2 (Burns 1975) ($500,000 limitation on all damages); KAN. STAT. ANN. § 60-3407 (Supp. 1991) ($1 million limitation on all damages, $250,000 limitation on noneconomic damages); KAN. STAT. ANN. § 60-10a02 (Supp. 1991) ($250,000 limitation on noneconomic damages); MD. CTS. & JUD. PRO. CODE ANN. § 11-108 (1989) ($350,000 limitation on noneconomic damages); MASS. GEN. L. ch. 231, § 60H (Supp. 1992) ($500,000 limitation on noneconomic damages); MICH. STAT. ANN. § 24A.1483 (Callaghan Supp. 1991) ($225,000 limitation on noneconomic damages, subject to exceptions and adjustments); MINN. STAT. ANN. § 549.23 (West 1988) ($250,000 limitation on intangible losses); MO. REV. STAT. § 538.210 (1988) ($350,000 limitation on noneconomic damages, annually adjusted for inflation); NEB. REV. STAT. § 44-2825 (1988) ($1 million limitation on all damages); N.H. REV. STAT. § 5084-D (Supp. 1991) ($875,000 limitation on noneconomic damages); N.M. STAT. ANN. § 41-5-6 (1989 & Supp. 1991) ($500,000 limitation on all damages, excepting medical care expenses); N.D. CENT. CODE § 26-40.1-11 (1978) ($300,000 limitation on all damages); OHIO REV. CODE ANN. § 2307.43 (Anderson 1991) ($200,000 limitation on all damages); OKLA. STAT. ANN. tit. 76, § 18 (West 1987) (limits recovery to actual medical expenses incurred, in action brought more than three years from incident); ORE. REV. STAT. § 18.560 (1989) ($500,000 limitation on noneconomic damages); S.D. CODIFIED LAWS ANN. § 21-

Such statutory limitations, or "caps," on damages have admittedly received a mixed reception in the state courts. In a substantial number of cases, both state and federal courts have sustained such statutes against a wide variety of constitutional challenges.[49] In a lesser number of cases, various forms of limitations on damages have been stricken as unconstitutional.[50] State court cases holding

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3-11 (1987) ($1 million limitation on all damages); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1992) ($250,000 limitation on all damages, exclusive of medical expenses); UTAH CODE ANN. § 78-14-7.1 (1987) ($250,000 limitation on noneconomic damages); V.I. CODE ANN. tit. 27, § 166B (Supp. 1991) ($250,000 per patient limitation on all damages; $75,000 limitation on noneconomic damages); VA. CODE ANN. § 8.01-581.15 (1984) ($1 million limitation on all damages); WASH. REV. CODE ANN. § 4.56.250 (1988) (formula limitation on noneconomic damages based on life expectancy and average annual wages); W. VA. CODE § 55-7B-8 (Supp. 1991) ($1 million limitation on noneconomic damages); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1991) ($1 million limitation on noneconomic damages, annually adjusted).

[49]*See, e.g.*, Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102 (1992) (jury trial, due process, equal protection); Adams v. Children's Mercy Hospital, 832 S.W.2d 989 (Mo. 1991), *cert. denied*, No. 92-533 (U.S., Nov. 16, 1992) (state and federal equal protection, state open courts provision, trial by jury, due process); Robinson v. Charleston Area Medical Center, Inc., 414 S.E.2d 877 (W. Va. 1991) (equal protection, due process); Etheridge v. Medical Center Hospitals, 237 Va. 87, 376 S.E.2d 525 (1989) (equal protection, jury trial, due process, special legislation); Franklin v. Mazda Motor Corp., 704 F.Supp. 1325 (D. Md. 1989) (jury trial, access to courts); Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (equal protection, jury trial, due process); Rose v. Doctor's Hospital Facilities, 735 S.W.2d 244 (Tex. App. Dallas 1987), *aff'd*, 801 S.W.2d 841 (Tex. 1990) (due process, open courts, equal protection); Fein v. Permanente, 38 Cal.3d 127, 211 Cal. Rptr. 368, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985) (state and federal equal protection, due process); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (federal equal protection); Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980) (due process, equal protection, special legislation, right to jury trial); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977) (special legislation, equal protection); Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (state access to courts, due process, special legislation).

[50]*See, e.g.*, Moore v. Mobile Infirmary Association, 592 So.2d 156 (Ala. 1991) (state right to trial by jury; equal protection though no Alabama constitution equal protection clause); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (substantive due process); University of Miami v. Esharte, 585 So.2d 293 (Fla. App. 3d D. 1991) (same); Condemariam v. University Hospital, 775 P.2d 348

damage caps unconstitutional, however, have done so almost exclusively on grounds of perceived inconsistencies with state constitutional provisions. It does not appear that any such decision has squarely held a statutory limitation on recovery in tort to be proscribed by federal equal protection guarantees, certainly not in the absence of independent state constitutional bases for the decision. And, as previously noted, the federal courts which have addressed equal protection challenges to damage limitations and other medical malpractice reform measures, have been consistent and unanimous in applying the rational basis test to uphold such statutes. See *Boyd* v. *Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989); *Davis* v. *Omitowoju*, 833 F.2d 1155, 1158-59 (3d Cir. 1989); *Lucas* v. *United States*, 807 F.2d 414, 422 (5th Cir. 1986); *Hoffman* v. *United States*, 767 F.2d 1431, 1437 (9th Cir. 1985).[51]

There is no conflict among or between state or federal courts on the constitutionality of limitations on recovery in malpractice actions as a matter of federal equal protection. Indeed, petitioner does not claim that there is any conflict for this Court to resolve. There remains, then, no basis or reason for the Court to review this case. It should, accordingly, decline to do so.

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(Utah 1989) (jury trial, substantive due process); Kansas Malpractice Victims v. Bell, 757 P.2d 251 (Kan. 1988) (jury trial, due process); Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988) (open courts); Reynolds v. Porter, 760 P.2d 816 (Okla. 1988) (special legislation); Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) (access to courts provision; upheld on other grounds); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (state equal protection); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (state equal protection); Wright v. Central DuPage Hospital Association, 63 Ill.2d 313, 347 N.E.2d 736 (Ill. 1976) (equal protection).

[51] *See also* cases cited at note 38, *supra*.

CONCLUSION

For the foregoing reasons, Respondents, Jerome T. Medley, M.D., Warren P. McKenna, Jr., M.D., and Joseph P. Braud, M.D., respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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